IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-434

WILLIAM G. MILLIKEN, et al.,
Petitioners,

vs.

RONALD G. BRADLEY, et al.,
Respondents,

No. 73-435

ALLEN PARK PUBLIC SCHOOLS, et al.,
Petitioners,

vs.

RONALD G. BRADLEY, et al.,
Respondents,

No. 73-436

THE GROSSE POINTE PUBLIC SCHOOL SYSTEM,
Petitioner,

vs.

RONALD G. BRADLEY, et al.
Respondents.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AS AMICI CURIAE IN SUPPORT OF PETITIONERS

The undersigned school districts respectfully move for leave to file the attached brief as *amici curiae* in this cause. The consent of the attorneys for plaintiffs Ronald G. Bradley, et al., state defendants, and defendants Allen Park Public Schools, et al., Grosse Pointe Public School System, Royal Oak Public Schools, School District of the City of Detroit, Southfield Public Schools and Professional Personnel of Van Dyke has been obtained. The consent of the attorneys for defendants Kerry Green, et al., Detroit Federation of Teachers Local 231, American Federation of Teachers, AFL-CIO, and Denise Magdowski, et al., was requested but no response has been received from the attorneys for said defendants.

The undersigned school districts are located in Macomb, Oakland, Washtenaw and Wayne Counties in southeastern Michigan. Their interests in this case arise out of the possibility that the District Court will order metropolitanization of their public schools. None of the undersigned school districts was a party to the proceedings below or to the appeal taken therefrom, although all of them were recently joined as defendants by Order of the District Court dated September 10, 1973, subsequent to remand from the Court of Appeals.

The undersigned school districts believe that the attached brief deals with questions of law that may not adequately be discussed in the briefs to be filed by the parties to the appeal. In particular, they believe that the parties will not adequately deal with the failure of the Courts below to assure that the proceedings on remand will accord due process to the undersigned school districts by vacating all rulings affecting them. Furthermore, because the briefs of parties in the Court of Appeals did not discuss at length the question of the appropriateness of the trial forum, the undersigned school districts believe that the attached brief will contain a more complete argument on the issue of the necessity of convening a three-judge court.

Respectfully submitted,

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INTERESTS OF AMICI CURIAE

Amici curiae are the following Michigan school districts: Birmingham Public Schools, Bloomfield Hills School District, Clarenceville School District, Clintondale Community Schools, L'Anse Creuse Public Schools, Northville Public Schools, Plymouth Community School District of Wayne and Washtenaw

Counties, Southgate Community Schools, South Redford Schools, Van Dyke Public Schools, West Bloomfield School District, and Westwood Community School District. Approximately 88,900 pupils are currently enrolled in the schools in these districts. *Amici* are located in Macomb, Oakland, Washtenaw and Wayne Counties in southeastern Michigan and are affected by the Rulings and Orders entered by the District Court in *Bradley* v. *Milliken* and approved by the Court of Appeals for the Sixth Circuit. Not being parties to the trial proceedings in *Bradley*, *amici* have been afforded no meaningful opportunity to litigate any of the matters presented to the District Court, nor have they had standing to appeal its Rulings and Orders. Although *amici* were joined as defendants by Order of the District Court dated September 10, 1973, as entities whose presence has been deemed necessary for public school metropolitanization, no assurance was accorded them of a meaningful opportunity to challenge the constitutional predicate for metropolitanization.

SUMMARY OF ARGUMENT

Amici curiae are school districts organized and operating under the Constitution and laws of the State of Michigan. According to Michigan law, each school district is a corporate body having independent legal status and possessing broad powers with respect to educating the public school children residing within its geographic boundaries.

None of the undersigned school districts was joined as a defendant in the proceedings below until September 10, 1973, although the Complaint was filed on August 18, 1970, and an extensive trial and several appeals intervened. Even though the District Court took no proofs with respect to the establishment of the boundaries of the undersigned school districts or whether they had committed any act of *de jure* segregation, eight of them were included within the so-called "desegregation area" described in the District Court's Ruling on Desegregation Area and Order for De-

velopment of Plan of Desegregation entered on June 14, 1972.[1]

On the basis of its finding that school districts which are to be affected by the decree of the District Court are "necessary parties" under Rule 19, F.R.C.P., and, as a consequence, must be made parties to the litigation, the Court of Appeals vacated the District Court's June 14, 1972 Ruling and Order.[2] However, the District Court's September 27, 1971, March 24, 1972 and March 28, 1972 Rulings, which are the predicate for that vacated order, were affirmed.[3]

Two fatal errors permeate the rulings below:

First, the District Court concluded that a finding of constitutional violation within the School District of the City of Detroit permitted it to order metropolitanization of public schooling, notwithstanding the absence of a finding of constitutional violation in any school district other than Detroit. In sanctioning this procedure, the Court of Appeals disregarded this Court's prior decisions holding that the exercise of judicial power must be predicated upon a finding of constitutional violation. Because no such finding

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[1] The District Court's vacated June 14, 1972 Ruling and Order required the inclusion of 53 school districts in addition to Detroit to comprise the "desegregation area" (10a). * On August 31, 1973, plaintiffs filed an Amended Complaint, in which they allege that 84 local and intermediate school districts in addition to Detroit are necessary for desegregating Detroit's public schools. Of the 84, eight of *amici* are identified in Paragraph 15 of the Amended Complaint, and four of *amici* are identified in Paragraph 16 (Ia 297-Ia 298).

* Parenthetical page references followed by the letter "a" refer to the appendix filed by Petitioners in conjunction with their Petitions for Writ of Certiorari; page references preceded by a Roman numeral and the letter "a" refer to the five-volume appendix filed in this Court with Petitioners' Brief.

[2] *Bradley* v. *Milliken*, 433 F. 2d 897 (C.A. 6, 1970); 438 F.2d 945 (C.A. 6, 1971); 468 F.2d 902 (C.A. 6, 1972); *cert. denied* 409 U.S. 844 (1972); 338 F. Supp. 582 (E.D. Mich., 1971); 345 F. Supp. 914 (E.D. Mich., 1972); *aff'd in part, rev'd in part,* 484 F.2d 215 (C.A. 6, 1973); *cert. granted* 42 U.S.L.W. 3306 (U.S., Nov. 19, 1973).

[3] The Court of Appeals affirmed the March 24, 1972 Ruling, in part, but vacated it (190a). The affirmance apparently relates to metropolitanization (172a-173a).

has been made with respect to school districts other than Detroit, it was error to decree metropolitanization.

Second, the June 12, 1973 decision of the Court of Appeals deprived the undersigned school districts of due process because it failed to vacate the District Court's Ruling on Issue of Segregation (September 27, 1971), Ruling on Propriety of Considering a Metropolitan Remedy to Accomplish Desegregation of the Public Schools of the City of Detroit (March 24, 1972) and Findings of Fact and Conclusions of Law on Detroit-Only Plans of Desegregation (March 28, 1972). These three Rulings are the essence of the case. They were predicated upon evidence developed in a trial conducted in the absence of the undersigned school districts. Thus, these districts were deprived of an opportunity to be heard at a meaningful time in the proceedings.

The undersigned school districts should have been joined as parties to the action as soon as the District Court had reason to believe that their interests might be affected. Its failure to join them, either on its own motion or by granting the motion to compel joinder that pended before the District Court from June 17, 1971 until June 14, 1972, was error. Even though the Court of Appeals has now required the joinder of all affected school districts, the District Court's error has not been corrected because the Rulings of September 27, 1971, March 24, 1972[4] and March 28, 1972, upon which the joinder of those school districts is predicated, were not vacated. In fact, the Court of Appeals did not even require the District Court to receive any additional evidence with respect to these Rulings. Joinder of parties after the critical issues of a case have been decided vitiates due process.

Amici raise this additional argument: Metropolitanization will necessarily involve the invalidation of state statutes implementing Michigan's policy to retain local initiative and control of public schools in local school districts. Consequently, if this matter is remanded for further proceedings which could lead to metropolitanization of independent school districts, this Court should require the convening of a three-judge court.

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[4] See note 3.

ARGUMENT

I. THE INTERESTS OF THE UNDERSIGNED SCHOOL DISTRICTS IN THE PROCEEDINGS BELOW COULD NOT ADEQUATELY BE REPRESENTED BY OTHERS.

The Court of Appeals sanctioned the District Court's conclusion that metropolitanization of public schools is constitutionally required even though the proceedings in the lower court were conducted in the absence of many school districts thereby affected. In so doing, the Court of Appeals misapprehended both the legal status and the functional role of local school districts in Michigan.

It is manifest from an examination of the laws of Michigan that a school district is a corporate entity having independent legal status and possessing broad responsibility, authority and discretion with respect to the conduct of the educational process within its boundaries. The importance of local school districts in Michigan public education is recognized in Article VIII, § 2 of the Constitution of 1963, which provides:

> "Sec. 2. The legislature shall maintain and support a system of free public elementary and secondary schools as defined by law. Every *school district* shall provide for the education of its pupils without discrimination as to religion, creed, race, color or national origin." (Emphasis supplied)

Michigan's reliance upon local school districts to provide for the education of their pupils is recognized in three other provisions of its 1963 Constitution: art. IX, § 6; art. IX, § 11; and art. IX, § 16.

As set forth in MICH. CONST., art. VIII, § 2 (1963), the authority to delegate powers, duties and responsibilities to local school districts in Michigan resides in the legislature. In *Jones* v. *Grand Ledge Public Schools*, 349 Mich. 1, 84 N.W. 2d 327 (1957), the Michigan Supreme Court said:

> "It has been repeatedly recognized by this Court that the legislature is vested with complete authority to determine the

manner in which the directives of the Constitution shall be carried out, the creation and operation of a system of public schools, the creating of school districts, and the powers and duties of school officials chosen in accordance with the law." (349 Mich. 1, 4.)

In fulfillment of the responsibility vested in it under Michigan's successive constitutions, the legislature presently provides for the operation of approximately 600 school districts. Each of these entities has been established for the purpose of carrying out the legislature's responsibility to maintain and support public education. In *Jones* v. *Grand Ledge Public Schools, supra,* the Michigan Supreme Court recognized that local school districts "were given large plenary powers and control of school matters." (349 Mich. 1, 5, quoting from *MacQueen* v. *Port Huron City Commission,* 194 Mich. 328, 336, 160 N.W. 627 [1916]). This proposition was recently reaffirmed in *Hiers* v. *Detroit Superintendent of Schools,* 376 Mich. 225, 136 N.W. 2d 10 (1965).

In furtherance of its constitutional obligation to "maintain and support" public schools in Michigan, the legislature has established each school district as a "body corporate" which may sue and be sued, acquire and take property, and hold, use and sell the same. M.C.L.A. 340.352, M.S.A. 15.3352. The legislature has granted to each of Michigan's local school boards the responsibility for general care and custody of the schools and property of its district, and has empowered each board to make and enforce rules and regulations for the general management of its schools and the preservation of its property. M.C.L.A. 340.578, M.S.A. 15.3578; M.C.L.A. 340.614, M.S.A. 15.3614. Among the multitude of specific powers held by local school district authorities are the following: The power to acquire lands for school purposes by condemnation, M.C.L.A. 340.711, M.S.A. 15.3711, *et seq.*; the power to hire and contract with teachers and other personnel, M.C.L.A. 340.569, M.S.A. 15.3569; M.C.L.A. 340.569c, M.S.A. 15.3569(3); M.C.L.A. 340.574, M.S.A. 15.3574; the power to levy taxes necessary for all school operating purposes, M.C.L.A. 340.563, M.S.A. 15.3563; the power to borrow against anticipated receipts and to invest receipts, M.C.L.A. 340.567, M.S.A. 15.3567; M.C.L.A. 340.567a, M.S.A. 15.3567(1); the power to acquire real or personal property and equipment necessary for operation of the

school program, M.C.L.A. 340.576b, M.S.A. 15.3576(2); M.C.L.A. 340.576c, M.S.A. 15.3576(3); the power to determine courses of study, M.C.L.A. 340.583, M.S.A. 15.3583; the power to suspend or expel pupils, M.C.L.A. 340.613, M.S.A. 15.3613; the power to receive gifts and bequests for educational purposes, M.C.L.A. 340.605, M.S.A. 15.3605; the power to decide whether to offer a kindergarten program, M.C.L.A. 340.584, M.S.A. 15.3584; the power to offer adult education, M.C.L.A. 340.586, M.S.A. 15.3586; the power to offer nursery or day care programs, M.C.L.A. 340.587, M.S.A. 15.3587; the power to establish and operate camps, M.C.L.A. 340.602, M.S.A. 15.3602; the power to establish and operate vocational schools, M.C.L.A. 340.585, M.S.A. 15.3585; the power to establish attendance areas, M.C.L.A. 340.589, M.S.A. 15.3589; the power to operate and maintain a bus transportation program, M.C.L.A. 340.590, M.S.A. 15.3590, *et seq.*

We submit that the foregoing delegations of power by the Michigan legislature are persuasive indicia that each Michigan school district enjoys independent status. *Cf.*, *Moor* v. *County of Alameda*, 411 U.S. 693, 93 S. Ct. 1785, 36 L. Ed. 2d 596 (1973), *reh. denied* 412 U.S. 963 (1973), at 411 U.S. 719-720. Consequently, those districts which could be affected by metropolitanization were entitled to independent participation in the proceedings below from their inception.

The Court of Appeals also failed to perceive that neither the State Board of Education nor the state officers named as defendants could adequately represent the interests of the undersigned school districts in the proceedings below. Consequently, it did not recognize the prejudice to the undersigned school districts resulting from their absence from the important phases of those proceedings. We urge this Court to remedy that error.

There are important legal and functional distinctions between local school districts and the State Board of Education. The State Board of Education is responsible for providing leadership and general supervision of all public education in Michigan. MICH. CONST. art. VIII, § 3 (1963). Its contemplated function appears in the Convention Comment to that constitutional provision:

"This is a new section combining and enlarging upon the provisions in Section 2 and 6, Article XI, of the present constitution. It attempts to embody two fundamental principles: (1) the concern of all people in educational processes as a safeguard for democracy; (2) greater public participation in the operation of educational institutions.

"The enlarged state board provides a policy-making body on a state level. Michigan is one of three states that does not have such a board. Creation of a state board places the superintendent in the position of having constantly available *a consultative and deliberative body* of outstanding citizens who are representative of the people of the state.

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"It is proposed that the board be the *unifying and coordinating force for education within the state and receive information from all of the various levels of public education.* Such information would be considered by the board in determining *advice to local school boards, governing boards of colleges and universities, and the legislature* as to the total needs of education in this state.

"Appointment of the superintendent of public instruction by the state board follows present day trends in other states and would assure selection from among the most competent people available. Michigan elects its superintendent under the present constitution. The superintendent would be considered as administrative head of the state department of education and as such should be a staff officer to the governor and on his administrative board." (Convention Comment, MICH. CONST. art. VIII, § 3 [1963]; emphasis supplied)

The State Board of Education serves as a clearinghouse of information from all levels of education within the state and, after consultation and deliberation, renders advice to other entities within the state having educational responsibilities.

The legislature has acted to implement the State Board's constitutionally defined role, declaring that it "serves as the general planning and coordinating body for all public education including

higher education." M.C.L.A. 388.1009, M.S.A. 15.1023(9). While the State Board has been granted the power to make rules and regulations, M.C.L.A. 388.1015, M.S.A. 15.1023(15), those rules must be adopted in accordance with the State Administrative Procedures Act of 1969. M.C.L.A. 24.201, M.S.A. 3.560(101), *et seq.*; *Irving Parents' and Landowners' Association* v. *State Board of Education*, 45 Mich. App. 387, 206 N.W. 2d 503 (1973), *leave to appeal denied* (Slip Opinion, July 26, 1973).

It is manifest that the boundaries of Michigan school districts are subject to oversight by the legislature and that, under specified circumstances, the State Board of Education has been legislatively authorized to participate in school district reorganizations (168a-169a). M.C.L.A. 388.681, M.S.A. 15.2299(1); M.C.L.A. 388.711, M.S.A. 15.2299(51); M.C.L.A. 388.201, M.S.A. 15.1916(101). The point we emphasize is this: The State Board of Education is powerless to alter school district boundaries absent enabling legislation.

The Court of Appeals relied upon *Welling* v. *Livonia Board of Education*, 382 Mich. 620, 171 N.W. 2d 545 (1969) in apparently concluding that the State Board of Education, rather than local school districts, controls public education in Michigan (165a-171a). But in fact the *Welling* case merely confirms what is plain from Michigan's Constitution: Responsibility for education in Michigan is distributed between local school districts, which provide for the education of their pupils (art. VIII, § 2), and the State Board of Education, which provides districts with leadership and general supervision (art. VIII, § 3). [5]

In short, the distribution of educational responsibilities between school districts and the State Board of Education in Michigan is much like that of Texas as described in *San Antonio Independent School District* v. *Rodriguez*, 411 U.S. 1, 93 S. Ct.

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[5] The Court of Appeals plainly erred in stating that the State Board of Education was acting under its constitutional mandate without legislative authority in establishing an administrative rule requiring local school boards to provide a minimum number of hours per school year (167a). In fact, the statute, M.C.L.A. 340.575, M.S.A. 15.3575, construed in *Welling* specifically authorized the State Board to establish rules for its implementation.

1278, 36 L. Ed. 2d 16 (1973), *reh. denied* 411 U.S. 959 (1973), where Mr. Justice Powell concluded:

> "Although policy decision-making and supervision in certain areas are reserved to the State, the day-to-day authority over the 'management and control' of all public elementary and secondary schools is squarely placed on the local school boards. *** It cannot be seriously doubted that in Texas education remains largely a local function and that the preponderating bulk of all decisions affecting the schools are made and executed at the local level guaranteeing the greatest participation by those most directly concerned." (411 U.S. 1, 52, n. 108.)

Of the remaining state officer defendants, none has any significant authority over local school districts. The State Superintendent of Public Instruction is selected by the State Board, serves as its chairman without the right to vote and is responsible for the execution of its policies. He is the principal executive officer of the State Department of Education. The Governor and Attorney General do not control the operation of school districts or any other aspect of the public educational system in Michigan, although the Governor is an *ex officio* member of the State Board of Education without vote. (art. VIII, § 3)

School districts in Michigan derive their broad authority over the operation of public schools both from constitutional recognition and legislative enactments. Their authority extends to the exercise of independent discretion over vital educational areas, including basic responsibility for the day-to-day administration of all public schools in their respective districts. Neither the Michigan constitution nor any act of the legislature establishes local school districts as agencies of the State Board of Education, the Superintendent of Public Instruction or any other state officer defendant. Local school districts are constitutionally, legislatively and judicially recognized as independent legal entities in the State of Michigan.

As a consequence, any inference that the State Board of Education, Governor or any other defendant named in this case could serve as a proxy for the undersigned school districts in the proceedings in the District Court is without basis in law or fact, nor

can it be supported on a functional basis. Accordingly, the opinion of the Court of Appeals, insofar as it assumed the existence of such a relationship, was erroneous.

II. THE FAILURE OF THE COURTS BELOW TO ASSURE THE UNDERSIGNED SCHOOL DISTRICTS A FULL AND FAIR HEARING ON ALL ISSUES AFFECTING THEM CONSTITUTES A DENIAL OF DUE PROCESS.

Notwithstanding the facts that:

(a) In Michigan, education remains a local function, where the preponderating bulk of all decisions affecting the schools are made and executed at the local level;

(b) the District Court took no proofs respecting the establishment of the boundaries of the 86 public school districts in the counties of Wayne, Oakland and Macomb; and

(c) the District Court took no proofs on the issue of whether any school district (other than the Detroit school district) committed any act of *de jure* segregation,

the District Court decreed that the pluralistic school district concept adopted by the people of the State of Michigan must be swept aside, to be supplanted by metropolitanized schools. This decree was formulated following trial proceedings conducted in the absence of the undersigned school districts. These districts have thus been deprived by the federal courts of any meaningful opportunity to be heard with respect to the predicate for metropolitanization. This procedure has denied them due process under U.S. CONST. amend. V.

The Court of Appeals confirmed that the District Court had power to follow this procedure, characterizing school district boundaries in Michigan as "artificial" (172a). This characterization is without foundation either in Michigan law or in the trial record. Moreover, the labeling of school district lines as "artificial barriers" ignores the important recent rulings of this Court in *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 91 S. Ct. 1267, 28 L. Ed. 2d 554 (1971), *reh. denied*, 403 U.S. 912, 91

S. Ct. 2200, 29 L. Ed. 2d 689 (1971), and *San Antonio Independent School District* v. *Rodriguez*, 411 U.S. 1, 93 S. Ct. 1278, 36 L. Ed. 2d 16 (1973), *reh. denied*, 411 U.S. 959 (1973).

This Court stated in *Swann* that "it is important to remember that judicial powers may be exercised only on the basis of a constitutional violation." *Swann, supra*, 402 U.S. 1, 16. *Cf., Wright* v. *Council of City of Emporia*, 407 U.S. 451, 92 S. Ct. 2196, 33 L. Ed. 2d 51 (1972). "This Court has never doubted the propriety of maintaining political subdivisions within the States and has never found in the Equal Protection Clause any *per se* rule of 'territorial uniformity.' " *San Antonio Independent School District* v. *Rodriguez*, 411 U.S. 1, 54 n. 110 (1973). Nevertheless, the Court of Appeals, without any evidence of a constitutional violation by any school district other than Detroit, and without any proofs with respect to the establishment of school district boundaries, approved the dismantling of local school districts in southeastern Michigan.

It will doubtless be argued that the metropolitanization order is justified by the District Court's finding of constitutional violation with respect to the School District of the City of Detroit. It defies every element of due process, however, to predicate metropolitanization upon proceedings conducted in the absence of all but one of the affected school districts.

Due process requires that each affected school district be afforded a meaningful opportunity to be heard on all issues – particularly the basic issue of constitutional violation. The importance of meaningful involvement in litigation by a party potentially affected thereby as an essential element of due process has often been forcefully enunciated by this and other courts:

> "A fundamental requirement of due process is 'the opportunity to be heard.'*** It is an opportunity which must be granted at a meaningful time and in a meaningful manner." *(Armstrong* v. *Manzo*, 380 U.S. 545, 552, 85 S. Ct. 1187, 14 L. Ed. 2d 62 [1965])
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> ***

"The due process clause of the Fifth Amendment provides that no person shall be deprived of life, liberty or property without due process of law. An essential element of due process is an opportunity to be heard before the reaching of a judgment. By due process of law is meant 'a law, which hears before it condemns; which proceeds upon inquiry, and renders judgment only after trial.' Trustees of Dartmouth College v. Woodward, U.S. 1819, 4 Wheat. 518, 581, 4 L.Ed. 629 (Webster's argument). As said in Galpin v. Page, U.S. 1873, 18 Wall. 350, 368, 21 L.Ed. 959: 'It is a rule as old as the law, and never more to be respected than now, that no one shall be personally bound until he has had his day in court, by which is meant, until he has been duly cited to appear, *and has been afforded an opportunity to be heard.* Judgment without such citation and opportunity wants all the attributes of a judicial determination: it is judicial usurpation and oppression, and never can be upheld where justice is justly administered.' (Italics supplied)." *(L.B. Wilson, Inc.* v. *Federal Communications Commission,* 170 F.2d 793, 802 [(C.A. D.C., 1948)]

* * *

"We have frequently emphasized that the right to confront and cross-examine witnesses is a fundamental aspect of procedural due process." *(Jenkins* v. *McKeithen,* 395 U.S. 411, 428, 89 S. Ct. 1843, 23 L. Ed. 2d 404 [(1969)]

The requirement of due process has been applied in circumstances analogous to those before this Court in this appeal. In *Hazeltine Research, Inc.* v. *Zenith Radio Corp.,* 388 F. 2d 25 (C.A. 7, 1967), *modified,* 395 U.S. 100, 89 S. Ct. 1562, 23 L.Ed. 2d 129 (1969), the court of appeals concluded that the district court lacked jurisdiction to enter judgment against the parent corporation of Hazeltine Research, Inc., even though there were significant similarities in personnel and operations between the parent and its subsidiary and despite the parent's informed awareness of the litigation. In reaching this result, the court of appeals emphasized that the parent had not been named as a party, was not served with process and did not participate in the trial except to appear specially to contest entry of judgment against it. The court

of appeals reasoned that the parent was not "adequately represented" at trial by the subsidiary on an "alter ego" theory because that issue could only be resolved after an adversary determination of the facts involved.

The opinion of the court of appeals was affirmed in pertinent part in *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, *395* U.S. 100, 89 S. Ct. 1562, 23 L. Ed. 2d 129 (1969), in which this Court said:

> "The Court of Appeals was quite right in vacating the judgments against [the parent corporation]. It is elementary that one is not bound by a judgment *in personam* resulting from litigation in which he is not designated as a party or to which he has not been made a party by service of process. *Hansberry* v. *Lee*, 311 U.S. 32, 40-41 (1940). The consistent constitutional rule has been that a court has no power to adjudicate a personal claim or obligation unless it has jurisdiction over the person of the defendant. E.g., *Pennoyer* v. *Neff*, 95 U.S. 714 (1878); *Vanderbilt* v. *Vanderbilt*, 354 U.S. 416, 418 (1957)." (395 U.S. 100, 110)

The *Hazeltine* ruling, we contend, applies here. The undersigned school districts were not named as parties, were not served with process, and had no opportunity to participate in the trial of any of the issues now before this Court on appeal. The District Court did not purport to obtain jurisdiction over them until entry of its Order joining them dated September 10, 1973. Until then, the District Court was without power to adjudicate matters affecting the undersigned school districts.

The fact that certain state defendants were named as parties to the action from the outset does not, under the *Hazeltine* rule, permit the District Court to bind the undersigned school districts by its decree. First, as established in the first section of this brief, Michigan school districts are bodies corporate, with distinct powers to sue and be sued. Moreover, the state defendants had neither the power nor the duty to "adequately represent" the interests of the undersigned school districts at the trial of the basic issue of constitutional violation. They could not have done so, even if so empowered, because the question of constitutional violation in any school district other than Detroit was not in issue.

Accordingly, all of the rulings and orders of the District Court, specifically including those relating to the question of constitutional violation, should be vacated. The failure to name the undersigned school districts as defendants prior to trial, and the failure to allege any wrongdoing on their part, precluded adequate representation of their interests. See also, *Heyman* v. *Kline*, 444 F. 2d 65 (C.A. 2, 1971).

The Court of Appeals, while characterizing Michigan school districts as "instrumentalities of the State created for administrative convenience" (165a), ultimately accepts our analysis of their status. This is apparent from its holding that school districts "which are to be affected by the decree of the District Court are 'necessary parties' ", and must be made parties to this litigation "and afforded an opportunity to be heard" (177a). Yet the mandate of the Court of Appeals is constitutionally deficient because it does not require the District Court to reopen the proceedings upon which metropolitanization was predicated.

Counsel for plaintiffs' description of the expected format of further proceedings at trial underscores this fatal deficiency in the mandate of the Court of Appeals:

> "JUDGE DeMASCIO: The question I'm concerned about: What was the reason or reasons for vacating the metropolitan order?
>
> "MR. LUCAS: I think simply because one of the parties who should have been there when the metropolitan remedy was shaped, or a number of parties, weren't there. It's as if this Court did not grant the defendant the presence at his sentencing, and the Court of Appeals sent it back and said: He's got to be resentenced, and that's maybe an unfortunate analogy, but I tried to put it within the framework of this Court."[6]

This colloquy depicts proceedings on remand quite different from those described in plaintiffs' Response To Petitions For Certiorari.[7]

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[6] Transcript of argument on Motion of School District of the City of Detroit heard on December 11, 1972 before District Judges Kaess, Kennedy and De Mascio during absence from the bench of Judge Stephen J. Roth, at 64.

[7] See n. 2, p. 3, plaintiffs' Memorandum in Opposition to Petitions for Writs of Certiorari.

The Court of Appeals recognized that the undersigned school districts should have been joined as parties:

> "We hold that school districts which are to be affected by the decree of the District Court are 'necessary parties' under Rule 19. As a prerequisite to the implementation of a plan in this case affecting any school district, the affected district first must be made a party to this litigation and afforded an opportunity to be heard." (177a; 484 F.2d 215, 251-252)

However, its mandate to the District Court falls short of meeting the obligation embodied in Rule 19, F.R.C.P., because it does not compel vacation of the District Court's September 27, 1971 Ruling on the Issue of Segregation (17a), its March 24, 1972 Ruling on Propriety of Considering a Metropolitan Remedy to Accomplish Desegregation of the Public Schools of the City of Detroit (48a)[8] or its March 28, 1972 Findings of Fact and Conclusions of Law on the Detroit-Only Plans of Desegregation (53a). Those rulings of the District Court are the essence of the case. They significantly affect the interests of the undersigned school districts, and should not be permitted to stand now that these school districts have been joined.

Under the mandatory language of Rule 19, the District Court was obligated to join as a defendant any school district not before it upon discovering that disposition of the action in the absence of that school district might, as a practical matter, impair or impede its ability to protect an interest affected by the action. Rule 19(a), F.R.C.P. The District Court's failure to order timely joinder, and the Court of Appeals' subsequent refusal to vacate the ruling on constitutional violation, have deprived the undersigned school districts of their right to protect their interests.

The potentiality of metropolitanization was apparent to the District Court early in the trial proceedings. The trial judge indicated his awareness of the metropolitan thrust of the litigation well before filing the September 27, 1971 Ruling on the Issue of Segregation.[9] He did not, however, take the step which Rule 19 compels: Joinder of all school districts whose interests might be affected by metropolitanization.

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[8] See note 3.

[9] See colloquy between District Court and counsel for plaintiff at IIa 44 and between District Court and witness at IIIa 90, IIIa 92 and IIIa 153.

On June 17, 1971, intervening defendants Magdowski, *et al.*, filed a motion requesting entry of an order joining as parties defendant all of the school districts located in the counties of Macomb, Oakland and Wayne, describing those school districts as entities without which complete relief could not be granted to plaintiffs (Ia 119). The District Court continued the motion under advisement by Order entered March 15, 1972 (Ia 204) and considered it as withdrawn by Order entered June 14, 1972 (Ct. of Appeals app., Ia 407).

As outsiders, nonparties to the proceedings below, the undersigned school districts cannot be bound by any ruling of the District Court. This proposition was recently reaffirmed in *Provident Tradesmens Bank & Trust Co.* v. *Patterson*, 390 U.S. 102, 88 S. Ct. 733, 19 L.Ed. 2d 936 (1968), wherein this Court stated:

> "Of course, since the outsider is not before the court, he cannot be bound by the judgment rendered. This means, however, only that a judgment is not *res judicata* as to, or legally enforceable against, a nonparty." (390 U.S. 102, 110.)

Consequently, the September 27, 1971 Ruling, the March 24, 1972 Ruling and the March 28, 1972 Findings are not binding upon the undersigned nonparty school districts. Nonjoinder of a party may be raised on appeal, *sua sponte*. In the event of remand, the nonparty school districts should be permitted a full opportunity to litigate the matters in issue affecting their interests. Failure to accord this opportunity constitutes a violation of due process. See *Britton* v. *Green*, 325 F.2d 377 (C.A. 10, 1963); *Calcote* v. *Texas Pac. Coal & Oil Co.*, 157 F.2d 216, 224 (C.A. 5, 1946), *cert. denied*, 329 U.S. 782, 67 S. Ct. 205, 91 L. Ed. 671 (1946); Reed, "Compulsory Joinder of Parties in Civil Actions", 55 Mich. L. Rev. 327, 336 (1957); Wright & Miller, FEDERAL PRACTICE AND PROCEDURE, § 1602(a), nn. 48-52 (1972).

If this Court does not vacate the September 27, 1971, March 24, 1972 and March 28, 1972 decisions of the District Court, the undersigned school districts should be dismissed as parties because the Rulings affecting them were based upon proceedings conducted in the absence of indispensable parties. Any other conclusion contravenes "equity and good conscience." Rule 19(b), F.R.C.P.

III. BECAUSE THE VOIDING OF STATE STATUTES EMBODYING IMPORTANT STATE POLICIES IS NECESSARILY INVOLVED, A ONE-JUDGE DISTRICT COURT LACKS JURISDICTION TO ORDER METROPOLITANIZATION.

The District Court erred, once it had concluded that Detroit-only plans of desegregation were inadequate, because it failed to convene a three-judge district court pursuant to Title 28, U.S.C. § 2281. The Court of Appeals also erred by failing to order the convening of a three-judge court on remand. *Idlewild Bon Voyage Liquor Corp.* v. *Epstein*, 370 U.S. 713, 82 S. Ct. 1294, 8 L. Ed. 2d 794 (1962).

Under 28 U.S.C. § 2281, a single-judge district court is prohibited from restraining the enforcement, operation or execution by state officials of state statutes of general application upon the ground of the unconstitutionality of such statutes. Because they have this restraining effect, the metropolitanization rulings entered on March 24, 1972 (48a), March 28, 1972 (53a) and June 14, 1972 (97a) by the District Court are void for want of jurisdiction. Similarly, the Court of Appeals exceeded its jurisdiction in affirming the March 24 and March 28, 1972 rulings. *Stratton* v. *St. Louis S.W. R. Co.*, 282 U.S. 10, 51 S. Ct. 8, 75 L. Ed. 135 (1930).

Reduced to its essence, the purpose of 28 U.S.C. § 2281 is to provide "procedural protection against an improvident state-wide doom by a federal court of a state's legislative policy." *Phillips* v. *United States*, 312 U.S. 246, 251, 61 S. Ct. 480, 483, 85 L. Ed. 800 (1941). As described by Mr. Justice Harlan in *Swift & Co.* v. *Wickham*, 382 U.S. 111, 86 S. Ct. 258, 15 L. Ed. 2d 194 (1965):

> "Section 2281 was designed to provide a more responsible forum for the litigation of suits which, if successful, would render void state statutes embodying important state policies. The statute provides for notification to the State of a pending suit, 28 USC § 2284 (2) (1964 ed), thus preventing ex parte injunctions common previously. It provides for three judges, one of whom must be a circuit judge, 28 USC § 2284 (1) (1964 ed), *to allow a more authoritative determination and less opportunity for individual predilection in sensi-*

tive and politically emotional areas. It authorizes direct review by this Court, 28 USC § 1253, as a means of accelerating a final determination on the merits; . . ." (382 U.S. 111, 119; emphasis added)

Recognizing that 28 U.S.C. § 2281 has frequently been applied in desegregation cases (*Brown* v. *Board of Education*, *Briggs* v. *Elliott*, and *Davis* v. *County School Board*, 347 U.S. 483, 74 S. Ct. 686, 98 L. Ed. 873 [1954]), the question is: Does the requirement for a three-judge court apply in the case at bar?

So long as the proceedings in this case were confined to issues respecting the School District of the City of Detroit, the case was properly heard by a district court of one judge because the issues were then "local in application." *Bradley* v. *Milliken*, 433 F.2d 897, 900 n.2 (C.A. 6, 1970). But the "local" nature of the litigation ended when the District Court decided to apply its orders to school districts other than Detroit.

Sanctioned by the opinion of the Court of Appeals, and pursuant to the September 10, 1973 Order of the District Court (Ia 300), metropolitanization will affect 85 local school districts. These 85 districts educate approximately 932,300 children, or roughly 43.1% of Michigan's total school population.[10] Any metropolitanization order will necessarily restrain the operation of state statutes affecting some or all of these independent school districts, including large numbers of teachers and administrators. In the face of an order of such magnitude, it can scarcely be argued

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[10] As of the date of printing this Brief, the Michigan Department of Education has indicated that the public school population in the State of Michigan for 1973-74 totals 2,161,435, although this figure may be subject to adjustment. (Michigan Department of Education Report, Vol. 8, No. 5, December 10, 1973) Pupil populations for the 85 affected local school districts are reported in MICHIGAN EDUCATION DIRECTORY AND BUYER'S GUIDE 1973-1974, with the exception of four districts (Hamtramck Public Schools, Inkster Public Schools, Romulus Community Schools, and Westwood Community Schools), data with respect to which were excerpted from the "District Summary 1973 Fourth Friday Report" filed by each of those districts with the Michigan Department of Education. No data with respect to Macomb County Intermediate School District, Oakland County Intermediate School District, or Wayne County Intermediate School District are included in any of these figures.

that considerations of economy in judicial administration prevail against the convening of a three-judge court. *Jones* v. *Branigin*, 433 F.2d 576 (C.A. 6, 1970). Failure to convene a three-judge court under the mandate of 28 U.S.C. §2281 will more likely result in "extended delay, duplication of judicial effort, and harm to the parties." See, Note, *The Three Judge District Court: Scope and Procedure Under §2281*, 77 Harv. L. Rev. 299, 305(1963). In the event this cause is remanded to the District Court, ordering the convention of a three-judge court now will assure the litigants that they will not be "detoured" around a "procedural avenue" (*Spencer* v. *Kugler*, 454 F.2d 839, 846 [C.A. 3, 1972])en route to the ultimate resolution of the controversy.

Any order for metropolitanization of the school districts in southeastern Michigan must necessarily involve restraining the enforcement, operation or execution of statutes of statewide application. As noted in the first section of this brief, the entire statutory plan for delivery of educational services in Michigan is predicated upon a system of pluralistic school districts. School boards within such school districts are charged with the enforcement of state statutes within their boundaries. Examples of such statutes include:

(a) Legislation dealing with school district boundaries.[11]

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[11] Under Michigan law, the legislature is vested with the authority to provide by statute for the creation or modification of school district boundaries. *Attorney General* v. *Lowrey*, 131 Mich. 639, 92 N.W. 289 (1902), *aff'd*, 199 U.S. 233, 26 S. Ct. 27, 50 L. Ed. 167 (1905); *Child Welfare Society* v. *Kennedy School District*, 220 Mich. 290, 189 N.W. 1002 (1922). The present legislative policy in this regard is set forth in M.C.L.A. 340.21, M.S.A. 15.3021; M.C.L.A. 340.51, M.S.A. 15.3051; M.C.L.A. 340.101, M.S.A. 15.3101; M.C.L.A. 340.141, M.S.A. 15.3141; and M.C.L.A. 340.181, M.S.A. 15.3181, which confirm and continue the school districts in existence at the time of enactment of the School Code of 1955. The legislature has also established statutory procedures in very limited circumstances and under carefully prescribed statutory guidelines for the reclassification of school districts (M.C.L.A. 340.52, M.S.A. 15.3052; M.C.L.A. 340.102, M.S.A. 15.3102; M.C.L.A. 340.142, M.S.A. 15.3142; and M.C.L.A. 340.182, M.S.A. 15.3182), and for the dissolution (M.C.L.A. 340.3, M.S.A. 15.3003), consolidation (M.C.L.A. 340.401, M.S.A. 15.3401, *et seq.*), annexation (M.C.L.A. 340.431, M.S.A. 15.3431, *et seq.*), transfer of territory (M.C.L.A. 340.461, M.S.A. 15.3461, *et seq.*) and reorganization (M.C.L.A. 388.711, M.S.A. 15.2299 (51), *et seq.*) of school districts.

(b) The obligation of each school district to afford educational opportunities to its resident pupils and to control the attendance of students who are nonresidents of the district (MICH. CONST. art. VIII, § 2 (1963); M.C.L.A. 340.356, M.S.A. 15.3356; M.C.L.A. 340.589, M.S.A. 15.3589; M.C.L.A. 340.582, M.S.A. 15.3582).

(c) The responsibility of each school district to employ and allocate its teaching and administrative staff to educate resident pupils upon terms satisfactory to each school district (M.C.L.A. 340.569, M.S.A. 15.3569; M.C.L.A. 423.209, M.S.A. 17.455(9); M.C.L.A. 38.91, M.S.A. 15.1991) and in connection therewith each school district must abide by the Michigan Teachers' Tenure Act (M.C.L.A. 38.71, M.S.A. 15.1971) and the Public Employees' Collective Bargaining Act (M.C.L.A. 423.201, M.S.A. 17.455(1)).

(d) The right of each school district to control the construction, expansion and use of its school facilities (M.C.L.A. 340.77, M.S.A. 15.3077).

(e) The power of each school district to provide for the curriculum, activities, standards of conduct and safety of students within each school district. (M.C.L.A. 340.575, M.S.A. 15.3575; M.C.L.A. 340.583, M.S.A. 15.3583; M.C.L.A. 340.614, M.S.A. 15.3614; M.C.L.A. 340.882, M.S.A. 15.3882).

It is clear that implementation of the June 14, 1972 Ruling and Order of the District Court, now vacated by the Court of Appeals, would have restrained each affected school district in the enforcement, operation and execution of the foregoing statutes.[12] It is equally clear that any metropolitanization order fashioned in proceedings on remand would necessarily require issuance of an injunction barring the enforcement, operation or execution of the foregoing statutes.

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[12] See Petitions for Writ of Certiorari filed in this Court by Bloomfield Hills School District, School District of the City of Birmingham Clarenceville School District and West Bloomfield School District, *cert. denied*, 410 U.S. 954, 35 L. Ed. 2d 687 (1973); see also Ia 285- Ia 286.

The June 12, 1973 Opinion of the Court of Appeals reflects its belief that a statute of general application is under constitutional challenge in this case. The convening of a three-judge court should have been a consequence of that belief.

In that opinion, the Court of Appeals summarily rejected the notion that the boundaries of Michigan school districts are "sacrosanct" (174a) even though such boundaries are legislatively sanctioned. It described school district boundaries as "artificial" and declared that they may be disregarded (172a). Indeed, it held that school district boundaries in Michigan violate the constitutional mandate of *Brown* v. *Board of Education*, 347 U.S. 483, 74 S. Ct. 686, 98 L. Ed. 873 (1954) and that such boundaries "cannot be frozen for an unconstitutional purpose" (174a).[13]

Any doubt that the Court of Appeals concluded that Michigan's statutory framework must be subjected to significant alteration is put to rest by its suggestion that Michigan's state legislature should respond to its opinion (177a). Any judicial action taken in lieu of a legislative response must obviously include action restraining the enforcement of existing laws of statewide application. Only a three-judge court has such power.

The necessity for convening such a tribunal is further confirmed upon review of plaintiffs' Amended Complaint, filed August 31, 1973 (Ia 291). That pleading, on its face, seeks injunctive relief extending beyond the geographic boundaries of the Detroit school district (Ia 298). The prayer for such relief is predicated upon allegations, *inter alia*, that certain defendants "have advantaged themselves of existing school district lines and jurisdictional boundaries" (Ia 295) and that "present school district boundaries serve no compelling state interest" (Ia 296). Because the Constitution is the only yardstick against which proofs in support of these allegations may be measured, that requisite of 28 U.S.C. § 2281 is present.

That plaintiffs contemplate relief which, if decreed, must conflict with existing Michigan statutes is likewise apparent from

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[13] We reiterate that no proofs were taken by the District Court as to whether the boundaries of any school district were drawn or maintained for the purpose of furthering racial segregation (59a-60a).

their allegation in the Amended Complaint that the "pupils, teachers, resources and facilities" of some 53 local school districts (Ia 297) educating approximately 455,800 pupils in Michigan are "necessary" to accomplish effective desegregation of the Detroit schools, which educate approximately 277,500 pupils. Further, plaintiffs allege that the "pupils, teachers, resources and facilities" of an additional 33 local school districts educating approximately 199,000 students [14] are similarly "necessary" (Ia 297-Ia 298). Plaintiffs specifically invoke the power of the District Court to review any additions to school building capacity and staff hiring in the latter group of districts to determine the effect thereof "on the school desegregation plan" (Ia 298). Manifestly, the operation of Michigan's existing public education legislation must be restrained if the "pupils, teachers, resources and facilities" of the 85 school districts named in plaintiffs' Amended Complaint are dispersed outside their respective boundaries. We reiterate that because the enforcement of a statute may only be enjoined on constitutional grounds (*United States ex rel. McNeill* v. *Tanumianz*, 242 F.2d 191 [C.A. 3, 1957]) and because the statutes here sought to be enjoined are of statewide application, 28 U.S.C. § 2281 is operative.

Notwithstanding pleadings which may be indirect or obscure, a challenge to the constitutional validity of a state's education statutes is "beyond the discretionary purview of a single-judge district court and must be submitted to a three-judge panel." *Spencer* v. *Kugler*, 454 F.2d 839, 845 (C.A. 3, 1972). This Court approved the convening of a three-judge court where the pleadings presented a constitutional challenge to existing school district boundaries. *Spencer* v. *Kugler*, 326 F. Supp. 1235 (D.C. N.J., 1971), *aff'd.*, 404 U.S. 1027, 92 S. Ct. 707, 30 L. Ed. 2d 723 (1972).

It is clear that the imposition of metropolitanized schools in southeastern Michigan will require interdiction of statutes of statewide application rather than statutes which are "local in applica-

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[14] See note 9 for sources of data. The appendix printed for this Court apparently does not reflect *errata* appearing in the Amended Complaint as filed with the District Court. Those *errata* include the addition of Clarenceville, West Bloomfield, Livonia and Garden City to paragraph 15 and deletion of South Lake from paragraph 16 of the Amended Complaint.

tion." *Sailors* v. *Board of Education of the County of Kent*, 387 U.S. 105, 87 S. Ct. 1549, 18 L. Ed. 2d 650 (1967).

It is equally clear that the restraints which metropolitanization would necessarily impose upon the enforcement and execution of such statutes would be restraints upon "state officers". As this Court said in *Spielman Motor Sales Co.* v. *Dodge*, 295 U.S. 89, 55 S. Ct. 678, 79 L. Ed. 1322 (1935):

> "Where a statute embodies a policy of statewide concern, an officer, although chosen in a political subdivision and acting within that limited territory, may be charged with the duty of enforcing the statute in the interest of the State and not simply in the interest of the locality where he serves." (295 U.S. 89, 94)

The members of Michigan's local school boards are charged with the duty of enforcing, within the boundaries of each school district, policies of statewide concern set forth in the 1963 Michigan Constitution, the Michigan School Code of 1955 (M.C.L.A. 340.1, M.S.A. 15.3001, *et. seq.*), Teachers' Tenure Act (M.C.L.A. 38.71, M.S.A. 15.1971, *et. seq.*) and Public Employment Relations Act (M.C.L.A. 423.201, M.S.A. 17.455, *et seq.*).

It must be emphasized that plaintiffs' attack is not based upon allegations of erroneous administrative actions by school officials. The attack is upon the constitutionality of the statutory scheme itself; consequently, a three-judge court should be convened. *Ex parte Bransford*, 310 U.S. 354, 60 S. Ct. 947, 84 L Ed. 1249 (1940); *Spencer* v. *Kugler*, 454 F.2d 839, 844-845 (C.A. 3, 1972).

In order to "disregard" the "artificial barriers" posed by local school district lines (172a), there must be a finding of a constitutional violation (*Swann, supra*). To conclude otherwise, permitting the nullification of a statute without passing upons its constitutionality "would be a contradiction of reason, a usurpation of power." *Tarumianz, supra*, 242 F.2d 191, 195; *Board of Managers of Arkansas Tr. Sch. For Boys* v. *George*, 377 F.2d 228 (C.A. 8, 1967).

It is apparent that metropolitanization hearings would encompass all the requisites of 28 U.S.C. § 2281. Therefore, if this case is remanded for such proceedings, a three-judge court should be convened.

CONCLUSION

For the reasons stated, it is respectfully submitted that:

A. If the decision of this Court mandates metropolitanization proceedings, all rulings below should be vacated and a three-judge court should be convened;

B. If the decision of this Court mandates metropolitanization proceedings but does not vacate all rulings below, this Court should order the dismissal of the undersigned school districts;

C. If the decision of this Court does not mandate metropolitanization proceedings, this Court should order the dismissal of the undersigned school districts.

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CERTIFICATE OF SERVICE

I, Charles F. Clippert, one of the attorneys for *amici curiae* Bloomfield Hills School District, et al., and a member of the Bar of the Supreme Court of the United States, hereby certify that on January 2, 1974, I served copies of the foregoing Motion For Leave To File Brief As Amici Curiae In Support Of Petitioners and Brief Of Amici Curiae In Support Of Petitioners on the Petitioners and Respondents by depositing such copies in the United States mail, postage prepaid and addressed to the attorneys of record for Petitioners and Respondents, as follows:

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